

Adopt Part Env-C 720 to read as follows:

PART Env-C 720 PURPOSE AND APPLICABILITY OF INSTREAM FLOW RULES

Statutory Authority: RSA 483:9-c,I; RSA 483:11,IV

Env-C 720.01 Purpose.

(a) The purpose of the rules in Parts Env-C 720 through Env-C 724 is to implement the intent of the general court as stated in RSA 483:2, namely that instream flows be maintained by the rivers management and protection program "in a manner that will enhance or not diminish the enjoyment of outstanding river characteristics pursuant to RSA 483:1" and that the scenic beauty and recreational potential of such rivers be restored and maintained, that riparian interests be respected, and that the means by which these protections are achieved do not preempt land use and zoning authority granted to municipal bodies under RSA title LXIV.

(b) As stated in RSA 483:9-c,I, the purpose of establishing and protecting instream flows is to "maintain water for instream public uses and to protect the resources for which the river or segment is designated."

(c) The purpose of these rules also is to implement RSA 483:5 by allowing the commissioner to recommend required minimum releases at hydroelectric energy facilities licensed by the Federal Energy Regulatory Commission that can be recognized and used by all parties responsible for regulating flow at such facilities.

Env-C 720.02 Policy Considerations. In implementing these rules, the classification of the river or segment and the resources for which a particular river or segment was designated by the general court under RSA 483 shall be considered, in addition to the considerations identified in RSA 483:1, RSA 483:6,IV(a), and RSA 483:9-c, including:

- (a) Aesthetic characteristics;
- (b) Agriculture;
- (c) Community significance;
- (d) Conservation;
- (e) Cultural, historical, archaeological and scientific resources;
- (f) Environmental and ecological characteristics;
- (g) Fish and wildlife habitat;
- (h) Fisheries and wildlife;
- (I) Hydroelectric energy production;
- (j) Maintenance and enhancement of aquatic and fish life;
- (k) Navigation;
- (l) Other riparian interests;
- (m) Pollution abatement;
- (n) Protection of water quality;
- (o) Protection of public health;
- (p) Public water supply;
- (q) Recreation; and
- (r) Storage.

Env-C 720.03 Applicability.

(a) The rules in Parts Env-C 720 through Env-C 724 shall apply to all rivers and river

segments designated under RSA 483, the rivers management and protection act.

(b) Water users required to be registered with the department under RSA 482:3, III shall be subject to these rules if the water use is:

- (1) A consumptive use of water of a designated river as specified in Env-C 720.04;
- (2) A consumptive use of groundwater or of surface water as specified in Env-C 720.05; or
- (3) A hydroelectric energy facility, unless the water is used to power a turbine that:
 - a. Is located in the dam structure itself such that there is no diversion of the water away from the natural stream bed; and
 - b. The facility is operated in a run-of-river mode such that there is no storage of water for release at a later time.

(c) These rules shall not apply to any hydroelectric energy facility currently licensed by the Federal Energy Regulatory Commission for the term of the license in effect at the time these rules are adopted, but shall apply upon the expiration of the license.

(d) These rules shall not apply to any hydroelectric energy facility for which a flow requirement has been established as a term or condition of being granted an exemption from the Federal Energy Regulatory Commission licensing process prior to the adoption of these rules, for a period of 30 years from the date the exemption was initially granted or until the facility's existing power purchase contract expires, whichever is earlier.

Env-C 720.04 Consumptive Use of Water of a Designated River.

(a) Use of the water of a designated river shall be deemed to be consumptive if the return water meets any of the following conditions:

- (1) The quantity is less than that which is withdrawn;
- (2) The water is returned to a different location;
- (3) The water is returned at a different time from the withdrawal; or
- (4) The characteristics of the return water requires a discharge permit as specified in RSA 485-A:13.

(b) For any surface water user which returns some but not all of the withdrawn water, the consumptive use shall be the difference between the amount of water withdrawn and the amount of water of a quality that complies with an applicable discharge permit issued under RSA 485-A:13 that is returned to the surface water at the same time and in the same location as the withdrawal.

(c) The use of water for hydroelectric energy production shall not be deemed to be a consumptive use of water as defined by Env-C 720.04 or Env-C 720.05 for the purpose of these rules.

Env-C 720.05 Other Consumptive Use of Water.

(a) Any withdrawal of groundwater or surface water where the point of withdrawal is within 250 feet of a designated river shall be deemed to be consumptive unless the water user demonstrates, in accordance with this section, that the water being withdrawn has no hydraulic connection to the designated river.

(b) Upon request of the water user addressed to the department, the department shall provide the water user with information in the possession of the department relative to aquifers for purposes of assisting in preparing the demonstration.

(c) To demonstrate the lack of connection between the water being withdrawn and the designated river, the water user shall submit the following information to the department:

(1) The name, address and telephone number of the water user, and if the water user is not an individual, the name and telephone number of an individual who can be contacted relative to the request;

(2) The location of the facility that is subject to reduction/cessation orders;

(3) Information which demonstrates that there is no hydraulic connection between the water being withdrawn and the designated river, such as, but not limited to:

a. Stratigraphic logs and hydraulic measurements from 2 or more subsurface borings located between the point of withdrawal and the designated river that indicate one of the following conditions:

1. In the case of a groundwater withdrawal, a continuous impermeable layer exists at an elevation above the top of the well screen; or

2. In the case of a surface water withdrawal, a continuous impermeable layer completely underlies the surface water body;

3. In the case of a groundwater withdrawal, an unsaturated zone exists at any time below the local water table but above the well screen; or

4. In the case of a surface water withdrawal, an unsaturated zone exists at any time below the surface water body;

5. Hydraulic heads, measured as part of a pumping test performed on the withdrawal well, indicate that there is no contribution from the designated river.

b. Hydrochemical measurements that indicate one of the following conditions:

1. In the case of a groundwater withdrawal, the extreme maximum and minimum values of groundwater temperatures, measured monthly for one year at an elevation above the bottom of the screen of the withdrawal well, do not differ by more than 10 degrees celsius; or

2. The water maintains a chemical signature which has a 95 percent or higher probability of not being influenced by mixing with water of the designated river, provided that low streamflow conditions exist and drawdown in the withdrawal well is maximized at the time the groundwater and surface water samples are taken.

PART Env-C 721 DEFINITIONS FOR INSTREAM FLOW RULES

Env-C 721.01 "Adequate Gauged Data" means at least 10 years of continuous record station flow data as determined by the U.S. Geological Survey.

Env-C 721.02 "Affected water users" means those water users who are subject to these rules as specified in Env-C 720.03 through Env-C 720.05.

Env-C 721.03 "Aggrieved person" means any person demonstrating an interest in any of the factors identified in Env-C 720.02 which may be adversely affected by a decision regarding the protected instream flow(s) or trigger flows, wherein "adverse" means a negative change to the preexisting aesthetic, cultural, ecological, economic, recreational, or social value of the interest.

Env-C 721.04 "Commissioner" means the commissioner of the department of environmental services.

Env-C 721.05 "Consumptive Use" means any use which is determined to be consumptive pursuant to Env-C 720.04 or Env-C 720.05.

Env-C 721.06 "Daily withdrawal information" means the volume of water withdrawn on each day of a given season.

Env-C 721.07 "Department" means the department of environmental services.

Env-C 721.08 "Designated river" means any river or river segment that is designated under RSA 483.

Env-C 721.09 "LRMAC" means a local rivers management advisory committee established pursuant to RSA 483:8-a.

Env-C 721.10 "Non-exempt affected water users" means those water users who are subject to these rules as specified in Env-C 720.03 through Env-C 720.05, who have not been exempted pursuant to Env-C 722.08 through Env-C 722.10 from orders to reduce consumption that are issued pursuant to Env-C 722.02(c) and/or (d).

Env-C 721.11 "Protected Instream Flow" means the flow established under Env-C 723 or Env-C 724.

Env-C 721.12 "Public Water Supplier" means a supplier of water as defined in RSA 485:1-a,XVI.

Env-C 721.13 "Q50" means the river flow which is equaled or exceeded 50 percent of the time.

Env-C 721.14 "Q70" means the river flow which is equaled or exceeded 70 percent of the time.

Env-C 721.15 "Q80" means the river flow which is equaled or exceeded 80 percent of the time.

Env-C 721.16 "Q90" means the river flow which is equaled or exceeded 90 percent of the time.

Env-C 721.17 "Registered Water User" means any person or entity subject to Env-Wr 701 based on withdrawals.

Env-C 721.18 "Required minimum release" means the release established under Env-C 723

or Env-C 724.

Env-C 721.19 "RMAC" means the rivers management advisory committee established pursuant to RSA 483:8.

Env-C 721.20 "Trigger flow" means the flow specified in an advisory or order issued pursuant to Env-C 722.02.

Env-C 721.21 "Watershed" means one the 110 watersheds identified in the document NHDES-COM-MAP-1.

PART Env-C 722 PROTECTION OF INSTREAM FLOWS

Env-C 722.01 Maintenance of Instream Flows.

(a) Instream flows shall be maintained at hydroelectric energy facilities subject to these rules through a required minimum release, established pursuant to Env-C 723, that applies to the amount of water released instantaneously to the natural stream bed just below the dam.

(b) Consumptive water use when flow is at or below the trigger flows and protected instream flows shall be reduced through the process described in this part.

(c) The percent of flow in a designated river that can be lost to consumptive use in any watershed shall be based on the following trigger flows, as established pursuant to Env-C 723:

- (1) a phase I flow;
- (2) a phase II flow;
- (3) a phase III flow; and
- (4) a phase IV flow which shall be the protected instream flow.

(d) For purposes of RSA 483:9-c,IV, which allows the instream flow to fall below the protected level, the commissioner shall determine that a public water supply emergency which affects public health and safety exists in the following circumstances:

- (1) When the withdrawal is necessary to provide drinking water;
- (2) When the withdrawal is necessary to provide fire protection; or
- (3) When flow is required to be reduced, diverted or dammed in order to perform maintenance procedures required to protect public safety pursuant to RSA 482.

(e) If the commissioner makes a determination that an emergency exists under (d)(1) above, the commissioner shall allow the public water supplier to withdraw as much water as is necessary to provide drinking water.

(f) If the commissioner makes a determination that an emergency exists under (d)(2) above, the commissioner shall allow the person(s) responsible for providing fire protection to withdraw as much water as is necessary to provide fire protection.

(g) If the commissioner makes a determination that an emergency exists under (d)(3) above, the commissioner shall allow the person(s) responsible for maintaining the dam under RSA 482 to reduce, divert or dam as much water as is necessary to allow the maintenance procedures to be performed.

Env-C 722.02 Phased Reduction Flow Management.

(a) Determinations of the need to reduce consumptive water use shall be made separately for each watershed through which the designated river flows.

(b) Subject to Env-C 722.03, when daily average flows have been less than or equal to the phase I level for 7 consecutive days, the commissioner shall advise all non-exempt affected water users in that watershed that an order to reduce consumptive water use shall be issued if the daily average flows reach phase II levels for 7 consecutive days.

(c) Subject to Env-C 722.03, when daily average flows have been less than or equal to the phase II level for 7 consecutive days, the commissioner shall issue an order to all non-exempt affected water users in that watershed requiring them to reduce consumption so that the instantaneous total watershed-wide consumption of all affected water users shall be not more than 5% of the phase II flow.

(d) Subject to Env-C 722.03, when daily average flows have been less than or equal to the phase III level for 7 consecutive days, the commissioner shall issue an order to all non-exempt affected water users in that watershed requiring them to reduce consumption so that the instantaneous total watershed-wide consumption of all affected water users shall be not more than 2% of the phase III flow.

(e) Subject to Env-C 722.01(d) through (g), Env-C 722.03, and (f) below, when daily average flows have been less than or equal to the phase IV level for 7 consecutive days, the commissioner shall issue an order to all affected water users in that watershed requiring them to cease all consumptive uses.

(f) The commissioner shall issue an order to cease withdrawals whenever the NH fish and game department certifies that, while flows in a designated river have not been less than the phase IV level for 7 consecutive days, the flows are such that permanent adverse impacts will occur to aquatic life or habitat unless withdrawals are ceased.

(g) The availability of water for consumptive use by each affected water user pursuant to (c) or (d) above shall be determined in accordance with Env-C 722.06.

Env-C 722.03 Exceptions to Issuance of Advisories and Orders.

(a) If the total instantaneous watershed-wide consumption attributed to all affected water users on the designated river in the impacted watershed is less than 2 percent of the applicable trigger flow or protected instream flow, Env-C 722.02 shall not apply.

(b) If an order is not issued based on the provisions of (a) above, the commissioner shall instead advise the affected water users of the desirability of implementing conservation measures.

(c) Affected water users that are hydroelectric energy facilities shall maintain the required minimum release at all times and shall not be subject to the advisories and orders issued pursuant to Env-C 722.02.

Env-C 722.04 Duration of Advisories and Orders.

(a) Subject to (b) and (c) below, the advisories and orders issued by the commissioner to implement the phased reductions described above shall remain in effect for 10 consecutive days.

(b) If, based on available hydrologic data, the commissioner determines that flows will remain below the trigger flow for an extended period of time, the commissioner shall extend the advisory or order beyond the end of the 10-day period.

(c) If, based on available hydrologic data, the commissioner determines that flows will rise above and exceed the trigger flow for an extended period of time, the commissioner shall remove the advisory or order prior to the end of the 10-day period.

Env-C 722.05 Notice of Need for Reduction in Water Consumption. Whenever the department issues an advisory or order to affected water users pursuant to Env-C 722.02, it shall also issue:

(a) A press release in a paper that serves each watershed affected by the advisory or order notifying the general public about the need for water conservation; and

(b) Notification to all other registered water users in the watershed affected by the advisory or order requesting implementation of voluntary water conservation measures.

Env-C 722.06 Availability of Water.

(a) In order to determine the amount of water available to each affected water user, the department shall first determine for each season identified in Env-C 723.02:

(1) The total amount of consumptive use in the watershed by all affected water users under normal or non-conservation conditions (T_n) as determined pursuant to Env-C 722.07;

(2) For each affected water user, the amount of consumptive use by the user under normal or non-conservation conditions (W_{nx} , where x denotes separate users) as determined pursuant to Env-C 722.07; and

(3) The percentage of the total affected consumptive use in the watershed attributable to each affected water user (P_{nx}), calculated by dividing W_{nx} by T_n , as shown below:

$$P_{nx} = W_{nx} / T_n.$$

(b) The amount of water available for each affected water user shall be the percentage of the total affected seasonal consumptive use in the watershed attributable to the affected water user (P_{nx}) times the amount of water available for consumptive use. Thus, for phase II reductions each affected water user (x) may withdraw up to (P_{nx}) X (0.05) X (phase II flow), and for phase III reductions each affected water user may withdraw up to (P_{nx}) X (0.02) X (phase III flow).

Env-C 722.07 Determination of Non-Conservation Consumptive Use.

(a) The amount of consumptive use by all affected water users in a given watershed under normal or non-conservation conditions shall be the sum of the amounts determined pursuant to (b) and (c) below for the affected water users in that watershed.

(b) The amount of consumptive use under normal or non-conservation conditions for an

affected water user who has reported water withdrawals for at least one year prior to the effective date of these rules shall be determined as follows:

- (1) Subject to (2) through (4) below, the amount of consumptive use for a given season shall be the annual average of that season's total withdrawals as reported to the department for the period of record for that user, divided by the number of days in that season.
 - (2) For users that provide complete daily withdrawal information to the department, the amount of consumptive use for a given season shall be the annual average of that season's total withdrawals, as reported to the department for the period of record for that user, divided by the number of days of actual use.
 - (3) If for any month during the period of record the user did not report the amount of water withdrawn, the lowest reported amount for that month in the period of record shall be used for the month for which actual data is not available.
 - (4) The period of record shall be as follows:
 - a. For an affected water user who has reported water withdrawals for 5 or more years as of the effective date of these rules, 5 years ending on the effective date of these rules.
 - b. For an affected water user who has reported water withdrawals for less than 5 years but more than one year as of the effective date of these rules, the period beginning on the beginning date of the user's reporting and ending on the effective date of these rules.
- (c) The amount of consumptive use under normal or non-conservation conditions for an affected water user who has reported water withdrawals for 365 days or less as of the effective date of these rules shall be estimated by the department based on the following:
- (1) Any reported data for that season, together with consideration of whether consumptive use was reduced or ceased during the reporting period, for example in response to an advisory or order issued pursuant to Env-C 722.02;
 - (2) The user's estimate of its average withdrawal for that season;
 - (3) The number of days of actual withdrawal for that season or the number of days in a season not covered by reported daily withdrawal information;
 - (4) The user's type of use and other operational information, including whether the use is weather-dependent;
 - (5) Amounts withdrawn by other users who use water for the same purposes; and
 - (6) Any other information that is relevant to making the determination.

Env-C 722.08 Exemption from Reduction Orders Based on Water Conservation.

- (a) Any water user, other than a public water supplier, that is subject to these rules may request an exemption from the requirement to reduce water withdrawals under Env-C 722.02(c) and/or (d) based on implementation of permanent conservation measures addressing all water

use at a facility and a record of compliance with the reporting requirements of Env-Wr 700.

(b) To request the exemption, the water user shall submit the following information to the department:

- (1) The name, address and telephone number of the water user, and if the water user is not an individual, the name and telephone number of an individual who can be contacted relative to the request;
- (2) The location of the facility that is subject to reduction orders;
- (3) A complete description of all water use at the facility;
- (4) A complete description of the conservation program that the water user has implemented for the facility, including the date the program was implemented ; and
- (5) The amount of the reduction in the withdrawal as a result of the program.

(c) The department shall exempt the facility from the requirements to reduce water use under Env-C 722.02(c) and/or (d) based on implementation of a water conservation program if the department determines that:

- (1) The conservation program addresses all water use at the facility, either by identifying how the use has been reduced or eliminated or by explaining why it is not practical to reduce or eliminate the use; and
- (2) The conservation program has reduced the amount of water withdrawn from the designated river by at least as much as the amount of the reduction required under Env-C 722.02 (c) and/or (d), respectively, as calculated pursuant to Env-C 722.06; and
- (3) The measures are permanent in nature and are not related to reduced production or services provided by the facility.

Env-C 722.09 Exemption from Reduction Orders for New Users.

(a) Any water user, other than a public water supplier, who is subject to these rules but has reported water withdrawals for 365 days or less as of the effective date of these rules, may request an exemption from the requirement to reduce water withdrawals under Env-C 722.02(c) and/or (d) based on the facility having already minimized water use through design and/or operation features.

(b) To request the exemption, the water user shall submit the following information to the department:

- (1) The name, address and telephone number of the water user, and if the water user is not an individual, the name and telephone number of an individual who can be contacted relative to the request;
- (2) The location of the facility that is subject to reduction orders;
- (3) A complete description of all water use at the facility; and
- (4) A complete description of the how the water use at the facility has been minimized

through all cost-effective design and/or operation features.

(c) The department shall exempt the facility from the requirements to reduce water use under Env-C 722.02(c) and/or (d) if the department determines that:

- (1) Water use at the facility has been minimized through all cost-effective design and/or operation features; and
- (2) The measures are permanent in nature and are not related to reduced production or services provided by the facility.

Env-C 722.10 Exemption from Reduction/Cessation Orders for Public Water Suppliers.

(a) A public water supplier may request an exemption from reduction orders in accordance with this section.

(b) To request the exemption, the public water supplier shall submit the following information to the department:

- (1) The name, address and telephone number of the public water supplier, and the name and telephone number of an individual representing the public water supplier who can be contacted relative to the request;
- (2) The location of the facility that is subject to reduction orders;
- (3) A water conservation plan, as specified in (c) below, that will be implemented by the public water supplier;
- (4) A schedule for implementation of the water conservation plan; and
- (5) Information pertaining to the approval, if necessary, of the provisions of the plan by the NH public utilities commission or the local governing body of the public water supplier, as applicable.

(c) The plan shall identify the measures that will be implemented or required by the public water supplier to reduce water use by at least as much as the reductions that would be required under Env-C 722.02(c) and/or (d), respectively, including:

- (1) Customer metering;
- (2) Leak detection and repairs;
- (3) Requiring low-flow plumbing fixtures and/or flow restricting devices;
- (4) Restricting non-essential uses such as watering lawns, washing cars, and filling swimming pools;
- (5) Encouraging industrial reuse and recycling;
- (6) Adopting a water conservation rate structure which can include surcharge penalties;
- (7) Conducting or requiring residential, commercial, and industrial water audits;
- (8) Public education;
- (9) Any other measure determined by the public water supplier to be cost-effective.

(d) The plan may incorporate phased reduction flow management trigger flows to trigger the various components of the plan. Such trigger flows shall correspond to the trigger flows identified in Env-C 722.01(c) as determined pursuant to Env-C 723.

(e) The department shall approve the water conservation plan and shall exempt the public water supplier from the reduction orders under Env-C 722.02(c) and/or (d) for a period of 5 years from the date the protected instream flow(s) and corresponding trigger flows are established for the designated river affected by the public water supplier, provided that the water conservation plan meets the requirements of (b) through (d) above, subject to (f) and (g) below.

(f) Public water suppliers receiving an exemption under Env-C 722.10(e) shall report water use to the department as required by Env-Wr 701, and shall report annually to the department on the effectiveness of implementation of the water conservation plan in reducing water use by at least as much as the reductions that would have been required under Env-C 722.02(c) and/or (d), respectively. Failure to meet either or both of these reporting requirements shall nullify the exemption, resulting in the public water supplier being subject to orders issued under Env-C 722.02(c) and (d).

(g) The department shall review the justification for the exemption at the end of the 5 year period. This review shall be based on an analysis of the water use reports and annual reports on effectiveness of implementation of the water conservation plan submitted to the department by the public water supplier. As a result of the review, the department shall:

(1) Renew the exemption if the review shows that implementation of the water conservation plan has been effective in reducing water use by at least as much as the reductions that would have been required under Env-C 722.02(c) and/or (d), respectively; or

(2) Not renew the exemption if the review shows that implementation of the water conservation plan has not been effective in reducing water use by at least as much as the reductions that would have been required under Env-C 722.02(c) and/or (d), respectively.

(h) A renewed exemption shall continue from year to year provided:

(1) The public water supplier continues to comply with (f) above; and

(2) The information submitted by the public water supplier demonstrates the continuing effectiveness of implementation of the water conservation plan.

(i) If the exemption is not renewed, the public water supplier shall be subject to reduction orders issued pursuant to Env-C 722.02 until such time as the public water supplier can demonstrate effectiveness of implementation of the water conservation plan for at least 3 years, at which time the public water supplier may request an exemption from the reduction orders in accordance with this section.

(j) At 4 years from the date the first protected instream flow is established for a designated river, the department shall review the information reported under Env-C 722.10(f) by all users exempted under Env-C 722.10 regarding the efforts made to implement water conservation plans and the effectiveness of the plans, and shall consider the need to amend Env-C 722.10 to lessen the water use reductions necessary to retain an exemption under Env-C 722.10. Reduction levels may be lessened only if the department determines that:

(1) such lessening will not adversely affect the resources for which the river or segment was designated;

(2) the public water suppliers exempted under Env-C 722.10 have made good faith substantial efforts to achieve the necessary water use reductions; and

(3) achievement of the necessary water use reductions is not reasonably feasible as a result of circumstances beyond the control of the public water suppliers.

(k) If the department so determines that the water use reductions necessary to retain the Env-C 722.10 exemption need to be lessened, the department shall initiate rulemaking within one year of beginning the review. Nothing herein shall prevent the department from otherwise initiating rulemaking to amend all or any portion of Env-C 720.

PART Env-C 723 PROCESS FOR PROTECTED INSTREAM FLOW DETERMINATION

Env-C 723.01 Schedule for Establishing Protected Instream Flows.

(a) For any river or river segment that has been designated pursuant to RSA 483 as of the effective date of these rules, the department shall begin determining the protected instream flow(s) and required minimum releases pursuant to this part within 180 days of the effective date of these rules.

(b) For any river or river segment that is designated pursuant to RSA 483 after the effective date of these rules, the department shall begin determining the protected instream flow(s) pursuant to this part within 180 days of the effective date of the designation.

Env-C 723.02 Identification of Flow Patterns.

(a) In recognition that there is a seasonal variation in flows within the state, as well as a variation within those seasons from north to south, phase I, phase II, phase III and protected instream flows shall be based on seasons identified as follows:

- (1) Summer shall comprise June, July, August, September, and October;
- (2) Autumn shall comprise November and December;
- (3) Winter/northern shall comprise January, February and March;
- (4) Winter/southern shall comprise January and February;
- (5) Spring/northern shall comprise April and May; and
- (6) Spring/southern shall comprise March, April and May.

(b) The department, in consultation with the RMAC and the appropriate LRMAC, shall designate a river or river segment as "northern" if the spring runoff event typically begins in April and as "southern" if the spring runoff event typically begins in March.

Env-C 723.03 Protected Instream Flow Determinations.

(a) Protected instream flows shall be determined for designated rivers using the watersheds identified in document # NHDES-COM-MAP-1.

(b) A protected instream flow shall be determined for the point of lowest altitude, relative to

sea level, for each watershed through which the designated river flows. Flows upstream of the identified point shall be calculated based on adequate gauged data. If adequate gauged data is not available, regression analyses shall be used.

(c) Protected instream and trigger flows shall be established for each watershed through which the designated river flows. If necessary in order to protect specific instream resources or to address different hydrologic conditions in different portions of a watershed, more than one protected instream flow shall be established within a given watershed.

(d) The required minimum release(s) shall be established for each hydroelectric energy facility on a designated river.

Env-C 723.04 Proposed Trigger and Protected Instream Flows and Required Minimum Releases.

(a) The proposed phase I flow shall be the seasonal Q50.

(b) The proposed phase II flow shall be the seasonal Q70.

(c) The proposed phase III flow shall be the seasonal Q80.

(d) The proposed phase IV or protected instream flow shall be the seasonal Q90.

(e) The proposed required minimum release(s) from a hydroelectric energy facility shall be determined by applying the Interim Regional Policy for New England Stream Flow Recommendations, U.S. Fish and Wildlife Service, February 13, 1981.

Env-C 723.05 Recommendation for Protected Instream Flow.

(a) The commissioner, in consultation with the RMAC, shall develop the recommended trigger flows, protected instream flow(s) and required minimum release(s) for a designated river in accordance with this section. The methodology used to determine a protected instream flow shall be the same whether a river is designated as community, rural-community, rural or natural.

(b) In developing the recommended trigger flows, protected instream flow(s) and required minimum release(s), the commissioner and the RMAC shall consider:

(1) The proposed flow(s) and required minimum release(s) from Env-C 723.04;

(2) All factors identified in Env-C 720.02;

(3) Flows established pursuant to existing federal licensing processes or state contracts;

(4) Whether there are wastewater discharges that require a certain instream flow for permit compliance and/or maintaining water quality standards; and

(5) Whether the river contains flow-regulating structures such as dams, and if so, how such structures are used to manage flow; and

(6) All available information relevant to determining what flows are likely to stress existing aquatic life and/or habitat beyond the ability of the natural system to adjust to

changing flows without permanent adverse impacts.

(c) The recommended trigger flows, protected instream flow(s) and required minimum release(s) shall be set forth in writing and shall be made available pursuant to Env-C 723.06 for public comment. The recommendation shall identify all of the factors listed in (b) above together with an explanation of how each factor affected the protected instream or trigger flow, respectively.

Env-C 723.06 Notice and Opportunity for Public Comment.

(a) The department shall notify the public that the recommendation is available for public comment by issuing press releases and by sending written notice to each municipality through or past which the designated river flows.

(b) The department shall also send written notice to and solicit comment from the following:

- (1) Affected water users in the watershed;
- (2) Federal energy regulatory commission, for each designated river with a licensed hydropower site;
- (3) LRMAC members for the river in question;
- (4) National park service;
- (5) NH department of justice;
- (6) NH department of transportation;
- (7) Public utilities commission;
- (8) RMAC members designated under RSA 483:8,I and II;
- (9) State government of any state which shares a designated river;
- (10) U.S. environmental protection agency;
- (11) U.S. fish and wildlife service;
- (12) U.S. forest service, for each designated river inside the white mountain national forest; and
- (13) U.S. geological survey.

(c) The department, in cooperation with the LRMAC, shall hold at least one public hearing to receive public comment regarding the recommended protected instream flow. The public hearing shall be held in a community along the designated river.

Env-C 723.07 Establishment of Protected Instream Flows.

(a) Subject to (d) below, within 60 days of the close of the public comment period, the commissioner shall consider the recommendations resulting from Env-C 723.05 and all

information received during the public comment period, and shall then establish the protected instream flow(s), corresponding trigger flows and required minimum release(s) in cubic feet per second for the designated river.

(b) The commissioner's decision shall:

- (1) Be in writing;
- (2) Clearly state the basis for the established flow(s);
- (3) Include the assessment required by RSA 483:9-c,III; and
- (4) Include an explanation of how the public comments affected the established flows.

(c) The department shall publicize the decision by issuing press releases and by sending written notice to:

- (1) Each municipality through or past which the designated river flows;
- (2) All persons identified in Env-C 723.06(b); and
- (3) Any person who submitted written comments on the recommended flows who specifically requests to directly receive a copy of the notice of the established flows.

Env-C 723.08 Appeal of Protected Instream Flow.

(a) A person aggrieved by a decision of the commissioner made pursuant to Env-C 723.07 may request a reconsideration of the decision within 30 days of the date the decision is issued, in accordance with RSA 483:9-c,VI.

(b) The request shall be in writing and shall include the following:

- (1) The name, address and daytime telephone number of the person requesting the reconsideration and, if the requestor is other than an individual, the name of an individual who can be contacted on behalf of the organization requesting the reconsideration;
- (2) The specific change being sought, by either:
 - a. A percentage of the protected instream flow established by the commissioner;
 - b. A specific flow, in cubic feet per second; or
 - c. A specific flow duration value;
- (3) An explanation of how the flow that the commissioner established will adversely affect one or more of the factors identified in Env-C 720.02, together with supporting evidence and data; and
- (4) If applicable, the specific error(s) committed by the commissioner in evaluating the factors identified pursuant to (3) above.

(c) Within 30 days of receiving the request, the commissioner shall determine whether to:

- (1) Deny the request and affirm the established protected instream flow; or
- (2) Grant the request and reconsider the protected instream flow.

(d) If the commissioner denies the request, the commissioner shall notify the requestor in writing of the denial and shall specifically identify the reason(s) for the denial.

(e) If the commissioner grants the request, the commissioner shall notify the requestor in writing that the flow will be reconsidered. If the commissioner believes that an oral hearing would facilitate making a decision, the commissioner shall schedule an adjudicatory hearing and shall notify the requestor of the date, time and place of the hearing. Any hearing so scheduled shall be conducted in accordance with RSA 541-A and Env-C 200.

(f) Within 30 days of a hearing held in accordance with (e) above, or if no hearing is held within 30 days of the decision to reconsider the flow, the commissioner shall determine the protected instream flow, which shall be:

- (1) The protected instream flow established originally;
- (2) The protected instream flow requested by the person who filed the request; or
- (3) A different instream flow that is justified by the evidence.

(g) If the determination is to change the protected instream flow, the determination shall include an explanation of the changes, if any, that have occurred in each factor identified in Env-C 723.05(b) so as to render the previous flow invalid or otherwise undesirable.

(h) If the determination is to affirm the existing protected instream flow, the determination shall include an explanation of specifically why the requestor's affidavits, evidence, and data did not adequately support a change.

(i) If the protected instream flow changes as a result of the request, the phase I, phase II and phase III flows shall be adjusted as necessary.

(j) As specified in RSA 483:9-c, VI, the commissioner's decision on the request may be appealed in accordance with RSA 541.

PART Env-C 724 PETITION FOR CHANGE IN PROTECTED INSTREAM FLOW

Env-C 724.01 Filing of the Petition. Any person who wishes to have a protected instream flow changed may petition the commissioner in accordance with this part to change the protected instream flow no sooner than one year from the later of:

- (a) The date the protected instream flow was established;
- (b) The date of a final decision on an appeal taken pursuant to Env-C 723.07; or
- (c) The date of a final decision on a petition filed pursuant to this Part.

Env-C 724.02 Requirements for Petitions. The petition shall be in writing and shall include the following:

(a) The name, address and daytime telephone number of the petitioner and, if the petitioner is other than an individual, the name of an individual who can be contacted on behalf of the organization requesting the petition;

(b) The specific change requested, by either:

- (1) A percentage of the protected instream flow established by the commissioner;
- (2) A specific flow, in cubic feet per second; or
- (3) A specific flow duration value; and

(c) All data not available or considered at the time the protected instream flow was set.

Env-C 724.03 Initial Review of Petition.

(a) Upon receipt of a petition, the commissioner shall transmit a copy of the petition to the rivers coordinator and the RMAC. Within 45 days of receipt of the petition the commissioner, in consultation with the RMAC, shall determine whether:

- (1) To deny the petition and affirm the protected instream flow; or
- (2) To grant the petition and review the protected instream flow.

(b) If the change is sought on the basis of new data not available at the time the protected instream flow was set, the petition shall be denied if the data submitted with the petition is determined by the commissioner to have been considered in setting the protected instream flow, otherwise the petition shall be granted and the commissioner shall proceed in accordance with Env-C 724.04.

(c) If the petition is denied, the commissioner shall issue a written decision to the petitioner explaining the reason(s) for the denial within 60 days of the decision.

Env-C 724.04 Change In Protected Instream Flow In Response to Petition.

(a) If a petition for change is granted, the department shall, in cooperation with the RMAC and the LRMAC, conduct at least one public hearing to receive oral public comment on the change proposed by the petition. The hearing shall be held in a community along the designated river affected by the petition.

(b) Notice of the hearing(s) shall be mailed to the petitioner and to those identified in Env-C 723.06. The notice shall include the date(s), time(s) and place(s) of the hearing and shall identify the petitioner and the specific change that is being sought. The notice shall also indicate that written comments can be submitted for a period of 30 days following the last hearing.

(c) Within 90 days of the last oral public hearing, the department and the RMAC shall review all information submitted with the petition and all information and comments submitted during the public comment period. The RMAC shall recommend to the commissioner to:

- (1) Change the protected instream flow to the flow requested by the petitioner;
- (2) Change the protected instream flow to a different level, not necessarily that

requested by the petitioner; or

(3) Affirm the existing protected instream flow.

(d) If the recommendation is to change the protected instream flow, the recommendation shall include an explanation of the changes, if any, that have occurred in each factor identified in Env-C 723.05(b) so as to render the previous flow invalid or otherwise undesirable.

(e) If the recommendation is to affirm the existing protected instream flow, the recommendation shall include an explanation of specifically why the petitioner's affidavits, evidence, and data did not adequately support a change.

Env-C 724.05 Decision on Petition.

(a) Within 120 days of receipt of a recommendation pursuant to Env-C 724.04, the commissioner shall establish a new protected instream flow or shall affirm the existing protected instream flow.

(b) The commissioner's decision shall be in writing and shall clearly state the basis for the decision. If the commissioner accepts the recommendation submitted pursuant to Env-C 724.04, the commissioner's written decision shall incorporate the recommendation. If the commissioner does not accept the recommendation, the decision shall specifically identify the portion(s) of the recommendation with which the commissioner disagrees, and shall specifically state the basis for the decision.

(c) If the protected instream flow changes as a result of the petition, the phase I, phase II, phase III flows and minimum required release(s) shall be adjusted as necessary.